No. 98-9349

IN THE

Supreme Court of the United States

STEVEN DEWAYNE BOND,
Petitioner,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a search occurs when a law enforcement officer manipulates a bus passenger's personal carry-on luggage to determine its contents.

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OPINIONS AND ORDERS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit in *United States v. Bond*, 167 F.3d 225 (5th Cir. 1999), is reproduced in the Joint Appendix at 36-42. The district court's unreported orders denying Bond's motion to suppress and his motion to reconsider are reproduced in the Joint Appendix at 20-25, 26-28.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on February 8, 1999. Bond's petition for certiorari was timely filed on May 10, 1999, and was granted on October 12, 1999. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

After a bench trial in the U.S. District Court for the Western District of Texas, Petitioner Steven Dewayne Bond was convicted of possessing and conspiring to possess methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. He was sentenced to 57 months' imprisonment followed by a term of supervised release. The court of appeals affirmed his convictions.

Bond's Arrest. Bond's convictions were based on methamphetamine that was discovered in his carry-on luggage while he was traveling as a passenger on a Greyhound bus. The methamphetamine, which weighed 1.3 pounds, was wrapped in gray duct tape until it formed an oval-shaped mass. (J.A. 14; Tr. 12-13, 18, 53.)[1] The taped package was wrapped again in a pair of pants, and then placed inside a green canvas bag, along with clothing and food. (J.A. 12-14; Tr. 10, 12-13, 54-55.) The bag, measuring about a foot and a half long by a foot wide, was zipped shut. (J.A. 12; Tr. 10, 64.) Bond put his bag in the luggage bin directly over his seat on the bus. (J.A. 10; Tr. 8.)

As Bond traveled from California to Arkansas, his bus was required to stop at an immigration checkpoint operated by the U.S. Border Patrol near Sierra Blanca, Texas. (J.A. 6-7; Tr. 3-4, 25, 48.) The checkpoint, which is not on the U.S.-Mexico border, is located east of El Paso on Interstate Highway 10. (J.A. 6-7; Tr. 2-3, 25.) All buses entering the checkpoint are regularly diverted to a secondary inspection lane so that agents can board them and question passengers about their citizenship. (J.A. 6-8; Tr. 3-4, 28.) Approximately 12 to 16 buses enter the checkpoint daily, each of them carrying between 15 to 45 passengers. (Tr. 25.) Bond's bus, which could accommodate "at least 45" passengers, was nearly full. (Tr. 25, 67.)

Border Patrol Agent Cesar Cantu Jr. was on duty when Bond's bus arrived at the checkpoint. Following his routine, Cantu boarded the bus and walked from the front

[1] The Joint Appendix is cited as "J.A. [page]"; the transcript of the hearing on Bond's Motion to Suppress is cited as "Tr. [page]"; and the record of the court of appeals is cited as "[volume] C.A. [page]."

to the back conducting his immigration inspection. Once he was satisfied that all on board were lawfully in the country, Cantu began a "nonimmigration inspection" for drugs, working from the back to the front.[2] (J.A. 6-8, 10-11, 15; Tr. 2-4, 8, 30, 42-43.)

Continuing his routine, Agent Cantu worked his way out of the bus by "feeling and squeezing" the passengers' carry-on luggage stored in overhead bins. (J.A. 9-11, 15, 37; Tr. 6-9, 30, 38-39, 42.) In addition to manipulating luggage in the overhead bins, Cantu looked for luggage under the seats, sometimes asking passengers to move to conduct his inspection. (J.A. 9, 16; Tr. 6, 31-32.)[3]

"[S]queezing as many bags as [he] could on the way out" of the bus, Cantu came to the green canvas bag that Bond had placed above his seat. (J.A. 10-12; Tr. 8-10, 38.) The agent "felt" the bag and "squeezed" it "very hard"—hard enough to identify "a brick-like object" with "an outline of something of different mass inside of it." (J.A. 10-11, 15; Tr. 8-9, 30.)[4] Agent Cantu's tactile examination permitted him to feel the "edges of the brick." (J.A. 12; Tr. 10-11.) Based on this manipulation and his experience, the agent thought the brick-shaped object was narcotics. (J.A. 12; Tr. 10-11.)

[2] Cantu believed he had authority to inspect for narcotics based on an unspecified understanding between the Border Patrol and the Drug Enforcement Administration (DEA). (Tr. 33-34, 42.)

[3] In the commercial buses that Agent Cantu regularly inspected, the physical characteristics of the overhead bins varied: some were open, and others were closed compartments with a door and a latch. (J.A. 6-10; Tr. 3-4, 6-7.) If a bus had closed bins, Cantu would open all the bins so that he could "go along feeling of bags." (J.A. 9-10; Tr. 7.) Cantu could not remember whether the bins in Bond's bus were open or closed. (J.A. 9; Tr. 6-7.)

[4] Bond and his companion, James Wiggs, testified that Cantu grabbed, shook, squeezed, and sniffed the bag. (J.A. 18; Tr. 60, 71.)

Agent Cantu asked who owned the green bag, and Bond replied that he did. (J.A. 13; Tr. 12.) When the agent asked if he could open the bag, Bond said "go ahead." (J.A. 13-14; Tr. 12, 61.) Cantu opened the bag and found methamphetamine. (J.A. 14; Tr. 13, 19.) He advised Bond of his *Miranda* rights [5] and questioned him. (Tr. 14, 19.) Bond admitted that he possessed the methamphetamine and told the agent how he had come to have it. (Tr. 20-21.) Bond confessed again later, after another advisement of rights. (Tr. 44-51.)

The Motion to Suppress. Bond moved to suppress the methamphetamine and his confessions. (1 C.A. 17-25.) At the hearing on the motion, Agent Cantu testified that his squeezing and feeling of Bond's luggage was not based on any individualized suspicion, but was part of his routine inspection of bus passengers' luggage for drugs. (J.A. 9-12; Tr. 6, 8-11, 38.) The district court found that Cantu's actions were not a search and denied the motion to suppress. (J.A. 20-28.)

The Appeal. On appeal, Bond argued that the agent's manipulation of his carry-on luggage was a search, conducted without reasonable suspicion, probable cause, or consent. The U.S. Court of Appeals for the Fifth Circuit rejected this contention. Although finding that "Agent Cantu's manipulation of Bond's bag was calculated to detect contraband," the court held that the agent's manipulation of the luggage was not a search for Fourth Amendment purposes. (J.A. 40.) The court reasoned:

> Bond stored his bag in the overhead luggage bin of a Greyhound bus. The bin was a common area of the bus, and it was foreseeable that his bag would be squeezed, moved, and manipulated by others. On common carriers, passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage. By placing his bag in the overhead bin, Bond knowingly exposed it to the public and, therefore, did not have a reasonable expectation that his bag would not be handled or manipulated by others.

(*Id.* at 38-39).

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

SUMMARY OF THE ARGUMENT

A Fourth Amendment Search Occurred When a Law Enforcement Officer Manipulated Bond's Carry-On Luggage to Determine Its Contents.

Around the country, law enforcement officers—acting without probable cause, reasonable suspicion, or consent—manipulate travelers' carry-on luggage to inspect it for drugs. Such inspections are Fourth Amendment searches. The Fifth Circuit Court of Appeals, however, ruled that they are not. The court reasoned that no search occurs because travelers who place their luggage in an overhead bin expose it to handling by others, and consequently have no expectation of privacy in their luggage. The Fifth Circuit was incorrect. Travelers like Bond may subject their luggage to casual contact from others by placing it in an overhead bin. But neither Bond nor any other traveler knowingly exposes his luggage to the sort of intrusive and revealing manipulation that Agent Cantu used to inspect luggage. Cantu's manipulation of Bond's carry-on bag infringed Bond's reasonable expectation of privacy in his luggage and therefore was a search.

A. The Fourth Amendment specifically protects "persons, houses, papers, and effects" against unreasonable search and seizure. Luggage is a repository of one's personal "effects" and society accepts as reasonable the ex-

pectation that the contents of luggage will remain private. Bond manifested and preserved his expectation that the contents of his luggage would remain private by carrying his bag onto the bus and placing it in the overhead bin directly above his seat.

B. By manipulating Bond's carry-on bag in a manner calculated to reveal its contents, Agent Cantu infringed Bond's reasonable expectation of privacy. The agent's manipulation of Bond's bag bore the hallmarks of a search: it was physically intrusive, and it revealed private information about the contents of Bond's personal luggage. Like a patdown of outer clothing to find weapons, or manipulation of a pocket to investigate its contents—inspections that this Court has held are searches—Agent Cantu's tactile examination of Bond's luggage was a search.

C. The Fifth Circuit incorrectly concluded that Bond gave up the expectation of privacy in his luggage when he exposed it to the public by placing his bag in an overhead luggage bin. Neither Bond nor any other traveler relinquishes the expectation that the contents of a carry-on bag will remain private by temporarily stowing it in an overhead bin. Luggage is meant to secure the privacy and safety of one's personal effects while traveling. The Fourth Amendment's protection of luggage means nothing if merely placing a bag in an overhead bin extinguishes the expectation of privacy in its contents. By putting his bag in the bin, Bond might have subjected it to casual contact by other passengers, but Agent Cantu's squeezing and feeling of Bond's bag far exceeded what Bond could reasonably have expected from other passengers. Cantu thus conducted a search when he manually inspected Bond's bag for drugs by squeezing and feeling it—manipulation that Bond would never have reasonably expected from his fellow passengers.

ARGUMENT

A FOURTH AMENDMENT SEARCH OCCURRED WHEN A LAW ENFORCEMENT OFFICER MANIPULATED BOND'S CARRY-ON LUGGAGE TO DETERMINE ITS CONTENTS.

For purposes of the Fourth Amendment, a search occurs when the government infringes an individual's reasonable expectation of privacy. Bond, a passenger on a Greyhound bus, had a reasonable expectation of privacy in the carry-on bag that he placed in the overhead bin directly above his seat. Agent Cantu infringed Bond's expectation that the contents of his luggage would remain private when he manipulated Bond's bag in a manner calculated to determine whether it contained drugs. The agent's intrusive tactile examination of Bond's bag—undertaken without probable cause, reasonable suspicion, or consent—deprived Bond of the Fourth Amendment right "to be secure in [his] . . . effects, against unreasonable searches."

A. Bond Had a Reasonable Expectation of Privacy in the Contents of His Carry-On Luggage.

The Fourth Amendment's prohibition against unreasonable searches protects those "expectation[s] of privacy that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Society considers it reasonable for travelers like Bond to expect that the contents of their luggage will remain private. This Court has recognized that "a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment." *United States v. Place*, 462 U.S. 696, 707 (1983); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (Fourth Amendment protects personal luggage).

Travelers have a privacy interest in luggage because "luggage is intended as a repository of personal effects."

United States v. Chadwick, 433 U.S. 1, 13 & n.8 (1977), *abrogated on other grounds, California v. Acevedo*, 500 U.S. 565 (1991).[6] One's "effects" are explictly protected by the text of the Fourth Amendment, and the Framers of the amendment would have understood the term "effects" to include personal property—property like the contents of Bond's carry-on luggage. *See Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984) ("effects" in Fourth Amendment refers to personal, not real property); *see also Cardwell v. Lewis*, 417 U.S. 583, 591 (1974) (Fourth Amendment traditionally deemed to protect personal effects).[7]

Bond manifested his privacy expectation by carrying his closed luggage onto a Greyhound bus for his trip from California to Arkansas. Instead of checking his bag, Bond kept it in his control by placing it in the overhead bin directly above his seat. With his luggage close by, Bond had a reasonable expectation that its contents would remain private.

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[6] In *Acevedo*, this Court analyzed inconsistent Supreme Court authority governing the search of containers in automobiles—authority that included the *Chadwick* case. 500 U.S. at 565-80. The Court concluded that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained," but did not question the privacy interest in luggage. 500 U.S. at 580.

[7] During the post-revolutionary period, there was an outcry against searches of travelers' portmanteaus and saddlebags—showing that travelers have long had a special privacy interest in their personal luggage. *See* William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 1518-19 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Services); BENJAMIN GALE, BRIEF REMARKS ON SEVERAL LAWS 44 (Hudson & Goodwin, 1782) (title abbreviated). Objecting to such searches, Benjamin Gale wrote in 1782: "the practice is most infamous, and I would put up with a little smuggling, infamous as it is, sooner than give up the essential rights of a citizen of a Free State." GALE, *id.; see also* Cuddihy, at xxxiii, 1518-19.

B. Agent Cantu's Exploratory Tactile Examination of Bond's Bag Was a Search Because It Infringed Bond's Reasonable Expectation of Privacy in the Contents of His Luggage.

Using his sense of touch, Agent Cantu examined Bond's bag from the outside. Such examination constitutes a search when it is designed to reveal the presence of objects that are hidden from view. *See Minnesota v. Dickerson*, 508 U.S. 366, 378-79 (1993) (feeling outside of jacket pocket to investigate its contents was search); *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (frisk of outer clothing for weapons was search). With regard to a person's clothing, this Court has observed that "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces . . . in an attempt to find weapons is not a 'search.'" *Terry*, 392 U.S. at 16. It would likewise torture the English language to say that Agent Cantu's manipulation of the outside of Bond's luggage, in an attempt to find drugs, was not a search. Like the frisk at issue in *Terry*, Cantu's feeling and squeezing of Bond's bag was aimed at revealing hidden objects; it was calculated to reveal items with a size, shape, density, or other characteristic that indicated the presence of drugs. Cantu's exploratory manipulation was a search as that term is commonly understood.[8]

Cantu's actions were also a search under the Fourth Amendment, because they infringed Bond's reasonable

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[8] Since before the Fourth Amendment was drafted, to "search" has meant to "examine (a person) by handling, removal of garments, etc. in order to locate any concealed article." 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2746 (1993) (late Middle English usage 1350-1469); *see also Hernandez v. United States*, 353 F.2d 624, 626 (9th Cir. 1965) (search is "an 'exploratory investigation'" or "a 'prying into hidden places for that which was concealed . . . .' 38 Words & Phrases 401-02 (Perm. 2d), 123-26 (1965 P.P.)").

expectation of privacy. There is no talisman for determining whether government action constitutes a Fourth Amendment search But two factors are often significant: (1) whether government action was physically intrusive; [9] and (2) whether it was capable of revealing information about private matters.[10] Both these factors brand Agent Cantu's manipulation of Bond's bag as a search. It was physically intrusive, and it revealed information about the bag's contents—contents that traditionally have been protected by the Fourth Amendment.

1. *Agent Cantu's manipulation of Bond's luggage was physically intrusive.*

Physical intrusion by a government agent is neither necessary nor sufficient to find that a Fourth Amendment search occurred.[11] Such intrusion often constitutes a search, however, because it generally compromises privacy interests. *See Dickerson,* 508 U.S. at 378-79 (1993) (squeezing, sliding, and manipulating lump of cocaine is search); *Arizona v. Hicks,* 480 U.S. 321, 324-25 (1987) (moving stereo components in home is search); *Terry,*

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9 *See, e.g., Florida v. Riley,* 488 U.S. 445, 449 (1989) (plurality opinion) (observations of home and curtilage "not necessarily protected from inspection that involves no physical invasion"); *California v. Ciraolo,* 476 U.S. 207, 213 (1986) (observations from public navigable airspace "in a physically nonintrusive manner" not a search); *Dow Chemical Co. v. United States,* 476 U.S. 227, 237 (1986) (aerial observation "without physical entry" not a search).

10 *See, e.g., Dow Chemical Co.,* 476 U.S. at 238 (no search when photographs taken from air "not so revealing of intimate details as to raise constitutional concerns"); *Jacobsen,* 466 U.S. at 123 (no search when government conduct incapable of revealing any "arguably 'private' fact").

11 *See Katz v. United States,* 389 U.S. 347, 352-53 (1967) (not necessary); *Oliver,* 466 U.S. at 182-84 (not sufficient).

392 U.S. at 16-17 (patting down suspect's outer clothing is search).

In *Dickerson,* for example, this Court concluded that a search occurred when a police officer engaged in a tactile inspection similar to the inspection conducted by Cantu. 508 U.S. at 378. While frisking Dickerson's outer clothing for weapons, the officer discerned a small hard object in his pocket—an object that could not have been a weapon. *Id.* at 377-78. The officer did not look or reach into Dickerson's jacket pocket to investigate its contents; instead, he manipulated the object through the fabric of the pocket. *Id.* at 379. This Court found that the officer's "squeezing, sliding and otherwise manipulating the contents of [the] pocket," was a "further search" subject to Fourth Amendment constraints. *Id.* at 377-79.

Agent Cantu conducted the same sort of tactile inspection of Bond's luggage. Feeling through the fabric of Bond's carry-on canvas bag, Agent Cantu used his sense of touch to investigate its contents. Cantu testified that he first "felt" Bond's carry-on bag. (J.A. 10; Tr. 8.) That is, he examined and explored Bond's luggage using his sense of touch.[12] The agent then "squeezed" the bag. (J.A. 11; Tr. 9.) In other words, he compressed Bond's luggage by applying strong or heavy pressure to it with his hand.[13] Cantu admitted that he squeezed Bond's bag

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12 To "feel," in this sense, means "to examine or explore by touching." 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 929 (1993).

13 To "squeeze" means "to press forcefully together," or to "enclose . . . in one's hand and apply pressure." RANDOM HOUSE UNABRIDGED DICTIONARY 1851 (2d ed. 1993). A squeeze is "an application of strong or heavy pressure," 16 THE OXFORD ENGLISH DICTIONARY 410 (2d ed. 1989), and involves the exertion of "pressure . . . from opposite or all sides . . . so as to force together[.]" 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 3014 (1993).

"very hard." (J.A. 15; Tr. 30.) Cantu's manipulation of Bond's luggage was so intrusive that it allowed him to discern "a brick-like object" with "an outline of something of different mass inside of it." (J.A. 11; Tr. 9.) Although the brick of methamphetamine in Bond's luggage was heavily covered in duct tape, wrapped in a pair of pants, and contained in a canvas bag, the agent's tactile inspection was probing enough to reveal the "edges of the brick," a brick that was "hard." (J.A. 12, 14; Tr. 10, 12-13, 53.)

Agent Cantu's probing manipulation of Bond's bag was closely akin to the squeezing and sliding manipulation that occurred in *Dickerson*. It was more physically intrusive than moving a piece of property—an intrusion that this Court has found constituted a search. *See Hicks*, 480 U.S. at 324. Because of its intrusiveness, Cantu's exploratory tactile examination of Bond's bag "amounted to the sort of evidentiary search" that is subject to Fourth Amendment constraints. 508 U.S. at 378.

2. *Agent Cantu's manipulation of Bond's luggage revealed its contents.*

Agent Cantu's exploratory tactile examination of Bond's luggage was also a Fourth Amendment search because of the private information that it revealed. The "protection of privacy" is the "principal object of the Amendment." *Soldal v. Cook County, Ill.*, 506 U.S. 56, 64 (1992) (internal quotation omitted). Consequently, government action that reveals information about private matters often constitutes a search. *See Hicks*, 480 U.S. at 325 (moving stereo equipment revealed information about home); *United States v. Karo*, 468 U.S. 705, 715 (1984) (monitoring of "beeper" revealed fact about interior of home); *Katz*, 389 U.S. at 352-53 (electronic eavesdropping revealed contents of private telephone conversation).

In *Hicks*, this Court held that a search occurred when a police officer moved a piece of stereo equipment in Hicks's apartment. 480 U.S. at 324-25. Although the officer was legitimately in the apartment, moving the equipment invaded Hicks's protected privacy interest by revealing hidden information about the apartment's contents —serial numbers that appeared only on the bottom of a turntable. *Id.*

Like the moving of the turntable in *Hicks*, Agent Cantu's manipulation of Bond's luggage invaded a protected privacy interest because it revealed information about a private matter—the contents of Bond's luggage. The agent's manipulation revealed detailed and specific information about an item contained in Bond's luggage: a hard, brick-like object, with defined edges, and "something of different mass inside of it." (J.A. 11-12, Tr. 9, 10-11.) Based on this specific information, Cantu thought he had found drugs. (J.A. 12-13; Tr. 10-11.)

This Court has recognized that touch is an effective means of discovering specific information about hidden items: the "sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure" of the object felt. *Dickerson*, 508 U.S. at 376. In this case, the Fifth Circuit found that Agent Cantu's techniques were "calculated" to make precisely this sort of discovery. (J.A. 40.)

Such techniques are typical when an officer manipulates the outside of luggage to reveal its contents. Using his sense of touch, the officer must feel his way through the various contents of personal luggage to determine whether any of those contents has a size, shape, or density indicative of packaged drugs. The officer's "tactile inspection [is] . . . aimed at discovering the nature of the contents of the bag." *United States v. McDonald*, 100 F.3d 1320,

1333 (7th Cir. 1996) (Ripple, J., dissenting) (rejecting court's holding that manipulation of luggage not search). He must "work" a bag with his hands to "determine whether it contain[s] something of independent evidentiary value." *United States v. Nicholson*, 144 F.3d 632, 639 (10th Cir. 1998) (holding manipulation of luggage was search). The officer's manual probing must be sufficiently intrusive to permit identification of the internal contents of the luggage. *See McDonald*, 100 F.3d at 1333 (Ripple, J., dissenting). While Cantu was not questioned about what other contents of Bond's luggage were revealed by his manual inspection, a probing manipulation that is calculated to disclose seizable items is likewise capable of identifying any number of other objects that are commonly carried in personal luggage.

Of course, neither Agent Cantu's nor any other officer's subjective intent determines whether a Fourth Amendment search has occurred. *See Ciraolo*, 476 U.S. at 213-14 & n.2 (officer's intent to look for marijuana irrelevant). It is not the officer's purpose, but the means necessary to achieve that purpose which is subject to Fourth Amendment scrutiny. *Cf. Maryland v. Buie*, 494 U.S. 325, 335 (1990) (considering "aim" of a protective sweep); *Dickerson*, 508 U.S. at 378 (considering officer's purpose not to search for weapons, but to search for evidence); *Terry*, 392 U.S. at 16 (limited purpose of frisk was "to find weapons"). The manipulation necessary to reveal contraband packed in luggage is probing, physically intrusive, and revealing. Objectively considered, it constitutes a search, just as the similar manipulation in *Terry* and in *Dickerson* was found to be a search.

While *Terry* and *Dickerson* involved searches of a person, "persons" receive no more protection under the plain terms of the Fourth Amendment than the "effects" contained in Bond's luggage. Personal effects may be carried in one's luggage as readily as they may be carried in one's jacket pocket. It would be anomalous to find that the Fourth Amendment is implicated when a law enforcement officer "works" a pocket to discover its contents, but not when he "works" personal luggage for the same purpose. In either case, the officer's action is a serious infringement of privacy interests and, consequently, a search.

3. *The physical intrusiveness of Agent Cantu's exploratory manipulation, and the information it revealed, distinguish his actions from the dog sniff in* United States v. Place.

In *Place*, this Court considered whether a search occurred when DEA agents permitted a drug-detecting dog to sniff a traveler's luggage. 462 U.S. at 707. As the Court observed, the dog sniff was uniquely nonintrusive: "We are aware of no other investigative procedure that is so limited . . . in the manner in which the information is obtained[.]" *Id.* The dog sniff was also uniquely limited in the information it revealed. It disclosed only the presence or absence of contraband, and it was incapable of revealing anything else about the contents of Place's luggage. *Id.* Because the dog sniff was not intrusive, and because it could reveal nothing about the noncontraband contents of Place's luggage, this Court held that it was not a search. *Id.; see also Jacobsen*, 466 U.S. at 123-24 & n.24 (chemical test of white powder not search because, like dog sniff, it "could reveal nothing about noncontraband items").

The Court's narrow decision in *Place* has no application to the far more intrusive and revealing investigation conducted here. Unlike the dog sniff in *Place*, an exploratory feeling and squeezing manipulation is physically intrusive, and it reveals more than just the presence or absence of

contraband in a traveler's luggage. A "tactile examination" of luggage is capable of "reveal[ing] almost as much information as opening the bag itself, such as information about the number, the shape, and character of items, perhaps very personal items, inside the bag." *United States v. Gwinn*, 191 F.3d 874, 879 (8th Cir. 1999) (holding that manipulation of luggage is search). As illustrated by Agent Cantu's testimony, it was this sort of probing and intrusive manual inspection that occurred in Bond's case. Unlike the dog sniff in *Place*, an exploratory tactile examination like Cantu's infringes a traveler's reasonable expectation of privacy in the contents of his luggage.

C. Bond Did Not Relinquish His Reasonable Expectation of Privacy by Placing His Bag in the Luggage Bin Directly Over His Seat.

The Fifth Circuit Court of Appeals found that Bond had no reasonable expectation of privacy in his carry-on bag because he "knowingly exposed it to the public" by putting it in the overhead luggage bin on the Greyhound bus. (J.A. 39.) Observing that the bin was accessible to other bus passengers, the court reasoned that Bond could have expected his bag would be handled by others. *Id.*

The Fifth Circuit's ruling failed to recognize two crucial factors. First, luggage is designed to preserve the privacy and security of one's personal effects while traveling; privacy expectations are not forfeited when a traveler temporarily stows his luggage nearby as he travels. Second, Agent Cantu's feeling and squeezing of Bond's bag exceeded the incidental and casual contact that Bond would have expected from his fellow passengers. Bond could not have reasonably expected other passengers to feel and squeeze his luggage to discern its contents, thus he did not knowingly expose it to the type of intrusive tactile examination Cantu used to inspect luggage. By placing his bag

in the overhead bin. Bond did not relinquish his privacy interest in its contents.

1. *Travelers like Bond do not relinquish their reasonable expectation of privacy in luggage by putting it in an overhead bin.*

The "Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. Thus, "[w]hat a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.; see also O'Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring) ("It is privacy that is protected by the Fourth Amendment, not solitude."). Travelers like Bond preserve the privacy of their personal effects by placing them in luggage when they leave their homes. Luggage, by definition, is designed to carry one's personal effects while traveling. Traveling, a right protected by the Constitution, necessarily is done in places that are accessible to the public.

Travelers take their luggage into public terminals when leaving or arriving on buses and trains. Those buses and trains carry passengers on public thoroughfares while they travel. Carrying luggage through places that are accessible to the public does not mean that the right to expect privacy in the contents of that luggage is forfeited. *See Place*, 462 U.S. at 707 (privacy expectation in luggage contents at airport); *Chadwick*, 433 U.S. at 4-6 (privacy expectation in luggage at train station). To the contrary, one places personal effects in luggage in order to secure their privacy and safety while traveling. *See T.L.O.*, 469 U.S. at 337-40 (personal luggage conceals contents from plain view).

Putting luggage in a place accessible to others may affect one's expectation of privacy "in the existence and

the outward appearance of the luggage." *Ortega*, 480 U.S. at 716 (plurality opinion) (taking closed luggage to workplace). But the "expectation of privacy in the contents of the luggage is not affected in the same way." *Id.* That is so precisely because, as the repository of one's "effects," luggage is meant to keep personal effects private even in, and perhaps especially in, areas accessible to the public.

In this case, Bond manifested his expectation of privacy in the contents of his luggage by putting it in the overhead bin directly above his seat. By stowing his bag close by, Bond kept control of it; he retained the ability to prevent other passengers from interfering with it. Agent Cantu, by his show of authority, did what other passengers would not have been expected—or permitted—to do: he examined and explored Bond's carry-on luggage by feeling and squeezing it to determine its contents. By putting luggage in an overhead bin, neither Bond nor any other passenger relinquishes his right to be free from such an intrusive governmental invasion of protected privacy interests.

2. Bond did not knowingly expose his bag to an intrusive manipulation calculated to detect its contents.

When he put his bag in the bin above his seat, Bond knowingly exposed the outward appearance of his luggage to the view of other passengers. He may even have expected that other bus passengers would come into casual contact with his bag, pushing or moving it as they stored their own luggage in the overhead bin. *See Gwinn*, 191 F.3d at 879 (passengers may push aside or briefly touch others' bags); *Nicholson*, 144 F.3d at 639 (passengers may push or move others' bags). But Agent Cantu's

squeezing and feeling of Bond's luggage far exceeded the casual contact Bond could have expected from other passengers. Neither Bond nor any other person "traveling by bus or rail would expect, or permit, a fellow passenger to . . . squeeze or manipulate his or her hand baggage in a concerted attempt to determine the contents." *McDonald*, 100 F.3d at 1334 (Ripple, J., dissenting); *Gwinn*, 191 F.3d at 879 (majority of traveling public would not expect overhead luggage "to be subject to a calculated and thorough squeezing and manipulation").

When government action exceeds what could reasonably be expected from others, it cannot be said that one has knowingly exposed his protected privacy interests to that action. The Court made this distinction in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). In that case, a local magistrate accompanied police to an adult bookstore where he viewed films and examined books and magazines offered for sale to determine whether they were obscene. *Id.* at 322-23. Unlike a member of the public, the magistrate neither paid to view the films nor bought the publications he inspected. Instead, he directed the bookstore's proprietor to disable the coin-operated film projectors before he viewed the films, and he had police remove cellophane wrappers from books and magazines, as well as take items from a glass-enclosed case. *Id.*

The government contended that there was no expectation of privacy in these items because the bookstore proprietor displayed the films and magazines in a place where the public was invited to enter. 442 U.S. at 329. This Court disagreed. Although the magistrate was in an area accessible to the public, he was not seeing the books and films "as a customer would ordinarily see them." *Id.* Consequently, the bookstore's proprietor retained a reasonable expectation of privacy against government intrusion

into the property that he offered for sale. *Id.; see also Nicholson,* 144 F.3d at 639 (police manipulation that exceeded what could reasonably be expected from others was search); *United States v. Most,* 876 F.2d 191, 198 n.13 (D.C. Cir. 1989) (same).[14]

Agent Cantu did not handle Bond's bag as other passengers would reasonably have been expected to handle it. Instead, Cantu squeezed and felt Bond's luggage in a manner calculated to reveal its contents. Passengers traveling by common carrier do not engage in an exploratory examination of one another's bags using their sense of touch. Neither do they squeeze one anothers' personal luggage as Cantu did—they do not manipulate luggage in a manner calculated to reveal its contents.

By placing his luggage in the overhead bin, Bond might have subjected it to fellow passengers' casual contact. But he certainly did not knowingly expose it to the intrusive and exploratory manipulation that Agent Cantu used to inspect its contents. When Agent Cantu felt and squeezed Bond's luggage, he infringed Bond's reasonable expectation of privacy.

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[14] Indeed, Bond's "exposure" of his luggage on the Greyhound bus was significantly more limited than the exposure of property in the adult bookstore in *Lo-Ji Sales.* The general public was invited to enter the store: but only paying passengers and perhaps bus employees were invited to board the bus. *But see Bond,* 167 F.3d at 226 n.1 (bins accessible "to the general public"). (J.A. 38.) As access to the general public becomes more limited, greater limits are placed on intrusions by the government. *See Mancusi v. DeForte,* 392 U.S. 364, 369-70 (1968) (employees have expectation of privacy against intrusions by police at workplace); *Ortega,* 480 U.S. at 730 (Scalia, J., concurring) (exposure of home to spouse and children does not extinguish expectation of privacy against intrusion by government); *Most,* 876 F.2d at 197-98 (entrusting bag to care of grocery clerk did not relinquish expectation of privacy vis-a-vis police).

"The basic purpose" of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court,* 387 U.S. 523, 528 (1967). The amendment "gives concrete expression to the right of the people which is basic to a free society." *Id.* (internal quotation and citation omitted). It guarantees "the right to be let alone—the most comprehensive of rights and the right most valued by civilized" society. *Winston v. Lee,* 470 U.S. 753, 758 (1985) (quoting *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Agent Cantu's "inspection" of bus passengers' luggage for drugs was an arbitrary government invasion that violated the privacy and security the Fourth Amendment was meant to preserve.

Acting without probable cause, reasonable suspicion, or consent, Cantu manipulated travelers' personal carry-on luggage in an exploratory tactile examination calculated to reveal the private contents of their bags. Unless his conduct is ruled a search, the privacy interests of travelers everywhere—on buses, on trains, on subways, and even on the streets—will be severely compromised. People who put their jackets on a coat rack, their purses on a nearby chair, or their briefcases beside them on a bench, will subject those belongings to random, suspicionless handling by law enforcement officers, intent on discovering hidden items. Preventing this sort of widespread government intrusion into citizens' personal effects was the reason the Fourth Amendment was enacted. To give effect to "the essential rights of a citizen of a Free State,"[15] the Court must rule that Agent Cantu's conduct was a search.

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[15] GALE, BRIEF REMARKS ON SEVERAL LAWS 44.

CONCLUSION

The judgment of the Fifth Circuit Court of Appeals should be reversed and the methamphetamine and Bond's confessions ordered suppressed.

Respectfully submitted.

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